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X. None the less is he a citizen, and bound to share the common burden of responsibility for the purity of the common weal.

He must not shirk a proper performance of such duties nor hide behind the judicial gown in times of revolt against oppression or corruption or in crises of social change. His life must be personally, politically and judicially *teres atque rotundus*.

### CONCLUSIONS

In that remarkable book seeking to voice the desire of England for a higher and more spiritualized life, the author of *The Glass of Fashion* has embodied that ideal which must permeate every profession that identifies the moralities of that profession with the very character of the being of the man who professes it. His illustration of the expectation of honesty from those who serve him, by even a Bolshevik of the most criminal type, illustrates the fundamental idea of what the community expects of a man of character, and no man has a right, even in a democracy, to belong to a learned or skilled profession who has not the

fundamentals of high character which may be expected to develop into fullness by the very experiences of his service.

What conclusions are we to draw?

I. That, in any democracy, whether loosely organized or highly articulated, public servants must, in theory, be controlled by lofty standards of duty.

II. That the people are entitled to know what those standards are, *and where there are none, to prescribe them*.

III. That conformity to those standards must be enforceable in a proper tribunal.

IV. *That it is to the highest interest of the profession itself* that every case of violation of its ethical standards be investigated and all offenders dealt with "lest the *res publica* suffer."

V. That the courts, when unsprung by a bar of high ideals, have failed adequately to regulate professional conduct, and therefore the bar must be so organized as to be self-disciplinary. And this even at the risk of appearing to become an aristocracy, or an undemocratic guild.

VI. That judges, as well as lawyers, are to conform their conduct to even more exacting ethical standards.

## The Need for Standards of Ethics for Judges

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LEGAL ethics is defined in Rawle's third revision of Bouvier's *Law Dictionary* as follows: "That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client." On the subject of judicial ethics there is much confusion, by reason of the fact that a judge occupies a dual position. He is, first, a judicial officer of the state or of the

United States; and, second, in most cases, a member of the legal profession. It is not at all essential, however, that a judge should be a member of the legal profession and his membership in that profession is, therefore, an absolutely distinct thing from his judicial office. The highest court in England, the House of Lords, in its original form was composed principally of lay peers. The present House of Lords in its judicial capacity is

limited in membership to the law lords. The highest court in New York State was formerly the senate of that state, largely composed of laymen. In New Jersey lay judges have not been uncommon. The office of justice of the peace is probably held as often by laymen as by lawyers; in fact, in England the justice of the peace was usually a layman, whereas the lawyer was only his clerk.

#### PRESENT STATUS OF RULES OF CONDUCT FOR THE BENCH

Now, any standard of conduct for the members of an organization must necessarily be imposed on those members either by their own action or consent, or else by a superior power. Standards of ethics for judges, therefore, must be imposed on those judges either by their own action or consent, or by a superior power. It is, therefore, quite out of the question for any bar association to enact standards of ethics for judges. The opinion of the bar association may be absolutely sound, and the code of ethics which it chooses to formulate for judges may be absolutely perfect. The difficulty is not with the rules which the bar may undertake to prescribe for the bench, but with the jurisdiction of the bar to make any rules whatever. The function of the bar in such case is merely advisory. Nevertheless this function should be exercised to its fullest extent.

What standard of ethics has been prescribed for judges by the sovereign power of the state or of the United States? The standard in general is extremely vague. The Federal Constitution uses the words "good behavior." In addition to the general phrase of "high crimes and misdemeanors," the specific prohibitions in the state constitutions are few. Corruption and malfeasance in office, and refusal to perform the duties of the

office; drunkenness; acceptance of passes; and change of residence from the district in which the judge was elected, are the principal things prohibited. There is a very common provision that a judge shall not be eligible for another office, but the effect of this provision seems to be merely a disqualification of the judge for the additional office.

What rules of ethics have judges undertaken to lay down for their own conduct? So far as the writer is aware, no action whatever has been taken by any body of judges in this matter. In 1917 the Committee on Professional Ethics of the American Bar Association made the following recommendation:

That the suggestion of the propriety of the formulation and promulgation of canons for the judiciary be referred to the Judiciary Section of this Association for consideration in order, if the way be clear, to the appointment of a committee to take the matter under advisement.

At the meeting of the Judiciary Section in 1918, the recommendation referred to the Judiciary Section was not even considered.<sup>1</sup>

#### DO JUDGES NEED A CODE OF ETHICS?

Is there any need for a code of ethics for judges? The phrase "good behavior" is, of course, extremely vague. It is no vaguer, however, than the phrase in the articles of war by which an officer in the military service of the United States can be tried by court martial for "conduct unbecoming an officer and a gentleman." The vagueness of the phrase is by no means sufficient ground in itself for a more specific statement of the duties of a judge. It is submitted, however, that a situation has recently arisen which

<sup>1</sup> 1918 Report, pp. 466-469.

calls for a clearer definition of a judge's duties in some particulars. At the last meeting of the American Bar Association, Mr. Hampton L. Carson, a former president of the Association, presented the following resolution upon the unanimous vote of the executive committee:

*Resolved*, That the conduct of Kenesaw M. Landis in engaging in private employment and accepting private emolument while holding the position of a Federal Judge and receiving a salary from the Federal Government, meets with our unqualified condemnation, as conduct unworthy of the office of Judge, derogatory to the dignity of the Bench, and undermining public confidence in the independence of the judiciary.

Mr. Carson then read Article IV of the Constitution of the American Bar Association which provides, among other things, that one of the objects of the Association shall be to "uphold the honor of the profession of the law." Of what use was it for the Association to prescribe canons of ethics for the regulation of the conduct of active practitioners, if it knew that a man on whom the judicial ermine had fallen had yielded to the temptations of avarice and private gain? That a Federal judge drawing his salary of \$7,500 a year from the Federal Treasury should take \$42,500 a year from an allied club of baseball players was simply to drag the ermine in the mire. Although it must be that impeachment proceedings might not reach him, yet from every bar in this united country there rose up the withering scorn of the profession against the man who had stained its honor. Those who came to deliberate upon that which touches the honor of the profession would go away and hang their heads in shame if they did not rebuke such conduct.

The resolution of Mr. Carson was

adopted by the Association. That the Association had a right to express its opinion, is unquestionable. The only body having jurisdiction to inquire into the conduct of that official, is Congress, but any organization is entitled to express its opinion to Congress and to urge any action it may desire. It is for Congress to decide what weight attaches to the different opinions so expressed. Now, as a matter of fact, Congress has had the benefit of the opinion of the American Bar Association, and of the opinion of the National Baseball Association and it has chosen to follow the latter.

It is only fair to assume that the inaction of Congress in the Landis case is due to the fact that the American people as a whole are more in sympathy with the standards of judicial conduct indorsed by the National Baseball Association than with those indorsed by the American Bar Association.

#### NEED FOR SOVEREIGN POWER TO PRESCRIBE STANDARD OF JUDICIAL ETHICS<sup>2</sup>

Now, while the bar has no jurisdiction over the conduct of the bench, it is undoubtedly a great public misfortune when any judge so conducts himself as to receive the censure of the bar. There is no question as to what the judge in this particular case has done, but the baseball people think that what he has done is right, and the lawyers think that it is wrong. From the fact that Congress follows the opinion of the baseball magnates rather than that of the leaders of the bar, it is clear, either that the judgment of the bar is wrong, or else that its judgment is right but that the people at large have not been sufficiently educated to appreciate the standard of ethics upheld by the bar.

<sup>2</sup> For a proposed code of ethics for judges see the article by Mr. Jessup, page 27.

It seems highly desirable, therefore, that the sovereign power, which, in the case of the Federal judges, is the United States, should define more clearly the duties of a judge with reference to the acceptance of employment in other occupations. Whatever resolutions the bar may pass, it is useless to say that Judge Landis has violated any standard of judicial ethics, because no such standard has been prescribed, either by Congress or by the judges themselves, and it is not within the jurisdiction of the bar to prescribe a standard of ethics for the bench. That a proper standard of judicial ethics would prevent a judge from acting as Judge Landis has done, is the opinion of most lawyers, but that there is not at the present time any such existing standard is absolutely proved by the action, or rather the inaction, of Congress, which clearly establishes the fact that, in popular opinion, Judge Landis has done nothing to justify his removal from the bench.

The function of the bar, therefore, in the matter of judicial ethics, must be educational, and education is a slow process. It would be unwise to make rules that are too general in regard to the performance by a judge of non-judicial work. The best practical method of dealing with this subject would be to provide that a judge shall not engage in any other occupation without the consent of some administrative authority, such as, for example, the Chief Justice of the United States. The freedom of judges from all legislative and executive control is a freedom accompanied with responsibility. In most cases this responsibility is clearly recognized. If a particular judge is more influenced by his personal advantage than by the dignity of his

office, some administrative control over that judge is required, and at present no such administrative control exists, while the remedy by impeachment, as the Landis case has shown, is entirely inadequate.

#### DEGENERATION OF THE IDEA OF SOVEREIGNTY

The Landis case is symptomatic of the degeneration of the idea of sovereignty portrayed by Laski in his theory of the multiple state. Under a monarchy, service of the sovereign is the most important function. Under our American democracy, it is clear that our democratic sovereign regards the management of moving pictures as of more importance than the management of the Treasury or the Post-Office Department, and the administration of baseball as of more importance than the administration of justice. Mr. Carson speaks of "dragging the judicial ermine in the mire." As a matter of fact, the judicial ermine is simply used to dust off the home plate; which, to the people at large, seems a more important function than dusting off a law book. This degeneration of the idea of sovereignty is apparent in many ways. The other day a college professor was quoted as saying that any man who had more than 15 per cent of patriotism was a nuisance, asserting that 85 per cent of a citizen's loyalty should be devoted to other organizations than his country. *Panem et circenses* was the motto of the Roman populace when the Twelve Tables had been forgotten. Those who do not share Henry Ford's opinion that history is all bunk, may find an interesting precedent in Roman history as to the effect of a popular belief that amusements are more important than laws.